MOHAMMAD BAEE

v.

PEMBANGUNAN FARLIM SDN. BHD.

HIGH COURT MALAYA, TEMERLUH
KC VOHRAH J
[CIVIL SUIT NO. 130 OF 1985]
16 JULY 1988

CONTRACT: *Housing developer - To deliver vacant possession of house within 18 months from date of agreement - House not completed - Developer under receivership - Whether specific performance can be ordered against receiver - Whether damages the appropriate remedy.*

On 13 January 1979 the plaintiff entered into a sale and purchase agreement with the defendant to purchase Lot No. 76 in a housing estate of which the defendants were the developers. It was *inter alia* a term of the agreement that the construction of the house would be completed and ready for delivery within 18 months from the date of the agreement. The plaintiff filed his writ on 15 January 1985 at which time the house was yet to be completed. He claimed for Specific performance of the agreement for the delivery of vacant possession of a completed house and for liquidated damages under the agreement calculated from the date of the agreement to the date of judgment and subsequently to the date of actual completion. There was also a claim for damages and/or alternatively damages for breach of contract.

The defendant filed his defence and the plaintiff took out a summons to strike out the defence and for judgment against the defendant. The hearing was postponed a number of times.

In the meanwhile receivers were appointed in respect of the defendant company by a debenture holder on 2 December 1986 who argued that if specific performance is ordered it would be directed at the receiver who under s. 183 of the Companies Act would be personally responsible for debts incurred by him in his receivership and that would be an unfair burden on the receiver.

Held:

[1] On the facts of the present case if the Court was to order specific performance of the agreement it would entail the Receiver incurring debts personally and further if the Court were to so order and if the Receiver failed to complete the house he would be in contempt of Court. As such it would be wrong for the Court to order specific performance in this case.

[2] Further on the facts bearing in mind s. 20(1)(b) of the Specific Relief Act 1950, the contract cannot be specifically enforced as the Court would not be able to superintend the works required to complete the house.

[3] The plaintiff's remedy in this case lies in damages for breach of contract.

Cases referred to:

Macleod v. Alexander Sutherland Ltd. [1977] Scots Law Times
Freevale Ltd. v. Metrostore (Holdings) Ltd & Anor. [1984] 1 All ER 495
Tengku Farid bin Tengku Hussain & Ors. v. United Asian Bank Berhad [1985] 2 MLJ 199

Legislation referred to:

Companies Act 1965, s. 183
Specific Relief Act 1950, ss. 11, 20(1)(b), 21

JUDGMENT

KC Vohrah J:

On 13 January 1979 the plaintiff entered into a sale and purchase agreement with the defendant company, a housing developer, to purchase in a housing estate which the defendant company was developing, a lot therein, Lot No. 76, together with a single storey house to be erected thereon.

The defendant expressly convenated and agreed under cl. 15 of the agreement that the construction of the house would be completed and be ready for delivery to the plaintiff within 18 calendar months from the date of the execution of the agreement, i.e., on or before 13 July 1980.

The plaintiff filed his writ on 15 January 1985 and even by that date the house was not ready. The plaintiff claims for specific performance of the agreement for the delivery of vacant possession of "a complete house" at the housing estate and for liquidated damages under the same clause, cl. 15 of the agreement, calculated from day to day at the rate of 8% per annum on the purchase price from the date of the agreement (13 January 1979) to the date of judgment and subsequently to the date of actual completion and delivery of possession of the house. The plaintiff also claims special damages, and or alternatively damages for breach of contract, and costs.

The defendant filed its defence. And the plaintiff took out a summons to strike out the defence and for final judgment to be entered against the defendant for the reliefs claimed. For various reasons the hearing of the summons was postponed several times.

On the date of the hearing of the summons, Counsel for the defendant conceded there was no defence to the claim but disputed the right of the plaintiff to specific performance, liquidated damages and special damages as claimed.

I shall now deal with the matter of specific performance first.

Messrs Hanafiah, Roslan and Mohamad were appointed out of Court by debenture holder United Asian Bank Berhad as receiver and manager of the property of the defendant company on 2 December 1986 pursuant to a debenture date 17 March 1976. This appears from the affidavit (encl. 29) of Mr. Eapern Thomas, the agent of the receiver and manager of the defendant company. From the affidavit and the report of accounts of the defendant company attached to the affidavit, it appears that the defendant company will not be able to fulfil its contractual obligations made prior to the receivership; it would appear that the defendant company would be unable to complete the construction of the houses in the housing estate without further financial assistance. The defendant says that if specific performance is decreed it would be directed at the receiver and the receiver under s. 183 of the Companies Act 1965 (Revised 1973) is personally responsible for debts incurred by him in the course of receivership and that would be an unfair burden on the receiver. Counsel for the defendant relies on the Scottish authority of *Macleod v. Alexander Sutherland Ltd.* 1977 Scots Law Times (Notes of Recent Decision) 44 for this view.

Counsel for the plaintiff, however, relies on *Freevale Ltd. v Metrostore (Holdings) Ltd & Anor.* [1984] 1 All ER 495 to argue otherwise and the headnote reads:

> Where a limited company enters into a contract to sell land, thereby conferring on the purchaser an equitable interest in the land, the fact that the vendor company is placed in receivership by a debenture holder of the company prior to a completion of the contract does not destroy the purchaser's equitable interest in the land under the contract and substitute for

it a mere right to claim damages against the vendor company if the contract is not completed; instead the vendor company remains liable to complete the contract. Accordingly, the appointment of a receiver does not of itself afford the vendor company a defence to a claim by the purchaser for specific performance of the contract.

The plaintiff says that on the basis of this authority and the provisions of ss. 11 and 21 of the Specific Relief Act 1950 specific performance should be decreed.

Does the appointment of a receiver in the case defeat a claim for specific performance of the present contract?

In the case of *Freevale Ltd.*, Donald Ratee QC sitting as deputy Judge examined the Scottish case of *Macleod* where "A decree of implement" (the equivalent of a decree of specific performance) was requested for by Macleod ("pursuer") against Alexander Sutherland Ltd ("defenders"). The brief facts as appear at p. 44 of *Macleod* are as follows:

In 1972 the pursuer sold the defenders an area of ground at Inverness on missives which provided *inter alia* that the defenders should perform certain specified building and construction work in relation to the ground. The work was never carried out. The pursuer raised an action seeking decree implement and, failing implement, damages of Pound 10,000. The defenders were a company incorporated under the Companies Act, and a receiver was appointed to the Company in June 1974 by creditors holding a floating charge secured over the company's entire assets. The receiver accordingly had complete control over the company' assets. The defenders had ceased to trade in the sense that they were no longer carrying on a building business. They did not employ anyone who could carry out the work, nor did they own the necessary materials. They averted that it was impossible for them to perform their obligations to the pursuer. Section 17(4) of the Companies (Floating Charges and Receivers) (Scotland) Act 1972 provides that contracts undertaken by a company prior to the appointment of a receiver continue in force notwithstanding the appointment. Counsel for the pursuers submitted that it was no answer for a company which had undertaken contractual obligations to say that they no longer had the means of performing them. The defendants admitted that they were in breach of contract and were willing that decree should pass against them for payment of damages. The only question remaining at issue was whether the pursuer was entitled to decree of specific implement.

The Lord Ordinary, Lord Stott, refused to grant the decree of implement but granted decree for payment of damages. He said,

It is plain that the defenders are not in a position to obtemper decree of specific implement through their directors as would normally be the position if the company were not in receivership. Counsel for the pursuer, however, submitted that the position was fundamentally the same, inasmuch as they would be able to act through the receiver. But the receiver is not in the position of a director. No doubt he is deemed to be the agent of the company in relation to its property, but his acts are not the acts of the company. They are his own acts and by s. 17(2) of the Act he incurs personal liability on a contract entered into by him in the performance of his functions. It is true that, as Counsel pointed out, he has a right to be indemnified out of the company's property, but whether that right is of practical value may be a question of circumstances, and in any event the fact remains that the primary liability rests on the receiver himself. Since *ex hypothesi* the responsibility for whatever is done in implement of the contract must in fact be done by the receiver it seems to me to be out of the question to pronounce a decree ostensibly against the company, which would in effect result in the receiver either incurring personal liability or in his bearing the responsibility for a contempt of Court (whether his own or the company's). That consideration applies with all the greater force when I am asked to pronounce such a decree in an action in which the receiver is not a party."

Lord Stott reinforced his argument for the refusal to grant the decree; he said,

> It follows from what I said that decree in terms of the pursuer's first conclusion should not be granted and the argument for refusing it is reinforced, if one considers the position from the point of view of enforcement. The only sanction suggested by Counsel for the pursuer for failure to obtemper such a decree against a limited company would be impossible of a monetary penalty, and Counsel was unable to refer to any report of such having been done... It would, I think, be inequitable to grant a decree *ad factum praestandum* against a company which can act only through the agency of a receiver and which, if the receiver should decline to act, would inevitably be in contempt of Court in respect of an omission which they would be powerless to remedy. To pronounce such an order in a case in which the sanction of a monetary penalty would have to be imposed on defenders for a contempt which they have no means of purging except through the intervention of an agent whose actings they have no power to control, would not only be ineffective, but would as it seems to me, be unfair to the defenders and no doubt also to their creditors ...

Judge Rattee in *Freevale Ltd* at p. 499 has neatly encapsulated the essence and nuances of the legal principles of *Macleod* in this passage,

> The facts, of course, in that case were that it was no longer physically possible for the company, which had become little more than a shell, it having ceased its business, to have complied with an order for specific performance to carry out the works required by the contract. The works could only have been carried out if the receiver, in exercise of his powers, had entered into some other obligations, contracts, be what they may, but some other arrangements whereby he or the company could acquire the means with which to perform the company's obligations under the contract, and the Lord Ordinary is saying, as I understand him in that passage I have just read, that being so, the decree for specific performance could only have been complied with at the cost of the receiver himself undertaking some personal liability, and that, not surprisingly, the Court would not impose.

Judge Rattee was of the view, however that the facts in *Macleod* took a long way from the problem that he had to deal with in the case before him. He said, *inter alia*,

> If my order for specific performance is made in the present case there is no question of the receiver having to incur any personal liability as the only alternative to be being in contempt of Court. The land the subject matter of the contract remains in the company. There is no difficulty, *prima facie*, at any rate, in its being conveyed by the company acting through the receiver pursuant to an order for specific performance if made.

In our case it is not a simple case of a mere transfer of a plot of land. What needs to be transferred is a plot of land, lot 76, with a completely built house on it. At the moment there is an incomplete house standing on the land, one of 145 incompletely built houses in phase 1 of a housing estate which, according to the uncontradicted averment of the project coordinator of the defendant (in encl. 15), is 75% completed. Financial assistance would certainly be needed to complete the house on lot 76. Now the defendant has had a long history of financial problems (see *Tengku Farid bin Tengku Hussain & Ors v. United Asian Bank Berhad* [1985] 2 MLJ 199) and it has ceased operations on the housing estate. The defendant was placed under receivership by debenture holder United Asian Bank Berhad and it is clear from the uncontroverted averment of the agent of the receiver (in encl. 29) that the defendant is unable to complete the construction of the housing units in the housing estate without further financial assistance. What the receiver would have to do if specific performance is ordered as prayed for, would be not merely effecting the transfer of lot 76 simpliciter but lot 76 with a complete house erected thereon and clearly a house fit for human habitation and approved by the proper authorities as fit for occupation. And that would entail the receiver having to employ a contractor or contractors to complete such house

meaning the incurring of personal liability on the part of the receiver under s. 183 of the Companies Act. Failure on the receiver's part to complete the plaintiff's house, which in effect means failure on receiver's part to incur personal liability, would open the receiver to being in contempt of Court and it would be wrong for the Court to order specific performance in the circumstances.

Even if I am wrong in adopting the principle in *Macleod* and applying it to the facts of the present case, I am of the view that the facts show that the contract cannot be specifically enforced as the Court will not be able to superintend the works required to complete the house. I have in mind s. 20(1)(b) of the Specific Relief Act 1950 (Act 137).

The subject matter of the contract is a house on a lot of land in a housing estate. The house is not completely built as yet. The lot, however, forms part of the overall development of the housing estate. To enforce the completion of a house on this one lot of land in the estate comprising 145 incompletely built houses would be to ignore the massive building works which would have to be carried out in the incompletely built housing estate. It is futile merely to order the completion of the house on lot 76 and the transfer of the property to the plaintiff; all that he would get would be the shell of a house, not fit for human habitation and of no commercial value so long as the housing estate remains uncompleted. According to uncontroverted evidence in the affidavit (encl. 15) of the project coordinator of the defendant, the housing estate is completed to the extent of 75%. The Court is not aware where this one lot of land stands in the housing estate but wherever it is situated it is unarguable that the basic infrastructure of the housing estate would have to be completed in tandem with the completion of the house on the lot; the basic infrastructure relating to the supply of electricity and water, to the laying down of a sewage system and a drainage system, roads, etc. would have to be laid before the house can be connected to these basic amenities; and the evidence is that the access road has not been approved for the estate. These are numerous and minute details relating to the works to be carried out which need the supervision of the Court and clearly the Court will be in no position so to do.

Again from the nature of the contract, bearing in mind that the lot with the house to be completed on it is intimately tied to the other 144 incompletely built houses on the housing estate with an incompletely built infrastructure, various approvals would have to be sought from relevant authorities in regard to the access road to the housing estate, the supply of water, the supply of electricity, the sewage mains, the drainage systems, etc. to the housing estate. There is also the important question of obtaining a certificate of fitness for occupation for that single house. These are approvals which the defendant would have to seek and there is no way the Court can safely say the approvals would be granted; from the very nature of these matters the Court would not be able to enforce an order that a completely built house be transferred to him if such an order is given.

To my mind the remedy lies in damages for breach of contract.

In the circumstances, on the defendant conceding that there is no defence to the plaintiff's claim, the plaintiff succeeds in his claim with costs save that I hold that this is not a proper case for granting specific performance. In my view damages should provide adequate remedy and I shall hear arguments as regards the quantum of damages to be awarded.

Also found at [1988] 2 CLJ 792